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No. 732

In the Supreme Court of the United States

OCTOBER TERM, 1964

BERNARD REICH, ET AL., PETITIONERS

v.

EUGENE WEBB, JR., ET AL., AND FEDERAL HOME LOAN BANK BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT HOME LOAN BANK BOARD IN OPPOSITION

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Petitioners are depositors, and therefore members, of the Beverly Hills Federal Savings and Loan Association. They sought leave to intervene as of right under Rule 24(a), Federal Rules of Civil Procedure, in litigation involving the Savings and Loan Association and the Federal Home Loan Bank Board and others, brought pursuant to 12 U.S.C. 1464(d)(1), a provision of the Home Owners' Loan Act. The district court denied petitioners' application to intervene on the ground that their interests were adequately protected by the Bank Board. *Beverly Hills Fed-*

eral S. & L. Ass'n v. *Federal Home Loan Bank Board,* 33 F.R.D. 292 (S.D. Cal.). The court of appeals affirmed, *sub nom. Reich* v. *Webb,* 336 F. 2d 153 (C.A. 9). Petitioners seek certiorari on the ground that their interests are in fact not adequately protected and that, therefore, they were entitled to intervene as of right.

As petitioners themselves note (Pet. 6), the underlying facts of the litigation are not in dispute. Briefly, the Federal Home Loan Bank Board has charged that certain transactions which resulted in the transfer of control of the Savings and Loan Association from a group headed by respondents Webb to one led by respondents Lytton were invalid and unlawful (R. 8). In the litigation, the Bank Board had asked in substance that the transfer of control be set aside, that a constructive trust be placed upon the proceeds of sale, and that appropriate damages be awarded the Savings and Loan Association and others (R. 211–231). Petitioners sought leave to intervene in this suit in their capacity as individual member-depositors of the Association and also to assert claims on behalf of the Savings and Loan Association itself and the other members of the Association similarly situated (R. 116).

The district court, after expressly finding that (33 F.R.D. at 294)—

> [Petitioners] have presented no interest on behalf of themselves or the Beverly Hills Federal Savings and Loan Association and the other members of said Association similarly

> situated, which will not be fully and adequately protected by the defendant, Federal Home Loan Bank Board * * *

ruled that petitioners were not entitled to intervene in the action as a matter of right under Rule 24(a). The district court also declined to permit petitioners to intervene as a matter of discretion, finding that to do so would "unduly delay and prejudice" the litigation. Petitioners were, however, granted permission to file briefs and present oral argument as *amici curiae* if they so desired.

The court of appeals expressly concurred in the district court's view that the relief sought by the Bank Board and petitioners was substantially the same, 336 F. 2d 153, 156 n. 5, and agreed that petitioners' interests would be adequately protected by the Bank Board. It therefore affirmed the district court's denial of intervention as of right.

Petitioners do not contend here that the Federal Home Loan Bank Board is not diligently prosecuting the litigation; nor do they claim that the Bank Board is seeking relief which is any way inconsistent with their own assertions. Rather, as we understand their petition, they assert a right to intervene on three other bases: (1) that, under decisions of this Court, the government can never adequately represent the interests of a private litigant; (2) that there is a conflict in decisions of the courts of appeals with regard to whether the Bank Board is in any event authorized to prosecute claims in the nature of this one; and (3) that, even if the Bank Board were

entitled to raise such claims, it is precluded from doing so in this case because of its failure to comply with the Administrative Procedure Act. We submit that the decisions below rejecting those contentions are entirely correct and present no matters meriting review by this Court.

1. Both lower courts held that the Federal Home Loan Bank Board, a disinterested governmental agency, is adequately representing petitioners' interests in this litigation. It has long been the rule that governmental agencies may adequately represent the interests of private litigants in class suits. See, *e.g.*, *Smith* v. *Illinois Bell Tel. Co.*, 270 U.S. 587; *In re Englehard,* 231 U.S. 646; *Archer* v. *United States,* 268 F. 2d 687, 689 (C.A. 10); *MacDonald* v. *United States,* 119 F. 2d 821, 827 (C.A. 9), modified on other grounds *sub nom. Great Northern Ry. Co.* v. *United States,* 315 U.S. 262.

Notwithstanding petitioners' assertions, the Court's decisions in *Kaufman* v. *Societe Internationale,* 343 U.S. 156, and *Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683, do not stand for a contrary proposition. In *Societe Internationale,* the Court ruled that the government's position in the litigation was adverse to that of certain minority stockholders and, for that reason, the minority stockholders were entitled to intervene under Rule 24(a). Petitioners assert no such conflict here. Petitioners' reliance on the *Sam Fox Publishing Co.* decision is similarly misplaced. There, intervention was sought by private parties in government antitrust litigation. The Court

held that, since the private litigants would not be bound by the judgment in the government litigation, they were not entitled to intervene as of right under Rule 24(a), even if the government's representation of their interests was inadequate. Plainly, that ruling does not aid petitioners here.

2. The court of appeals, in a carefully considered opinion, rejected petitioners' contention that the Bank Board had no authority to assert the common-law rights of members of a Federal Savings and Loan Association vis-à-vis the directors of the Association. The court correctly pointed out that 12 U.S.C. 1464(d)(1) grants the Bank Board wide authority to bring suit in its own name and to enforce not only the provisions of the Home Owners' Loan Act itself, but "any other law or regulation." The error of petitioners' attempt to give a very narrow interpretation to that provision is underscored by the fact that the act gives the Bank Board authority not merely to bring suit, but also to appoint a conservator or receiver for a Federal Savings and Loan Association which it deems to have committed a "violation of law or of a regulation." 12 U.S.C. 1464 (d)(2)(ii). This Court's decision in *Fahey* v. *Mallonee,* 332 U.S. 245, we submit, makes clear that the use of the Association for the personal gain of one or more of its officers or directors (the substance of the Bank Board's charge here) can serve as the basis for imposition of such a drastic remedy. 332 U.S. at 254. See, also, *Miami Beach Federal Savings and Loan Ass'n* v. *Callander,* 256 F. 2d 410, 414–415 (C.A. 5). Petitioner

suggests no reason why Congress would want to limit the Bank Board to that extreme remedy to correct situations of this kind. In the circumstances, the courts below correctly rejected petitioner's construction of the act.

Federal Home Loan Bank Board v. *Greater Delaware Valley Federal S. & L. Association,* 277 F. 2d 437 (C.A. 3), is not to the contrary. That case held that, in the absence of a regulation directing the manner in which a Federal Savings and Loan Association may convert to a State institution by vote of its shareholders, the Bank Board had no power to set aside a conversion otherwise made in accordance with the applicable statutory provisions. However, in that case the Bank Board also attempted to assert a right under "general equitable principles" to set aside the solicitation of proxies authorizing the conversion because the solicitors had not advised the members that the conduct of the Association's affairs was then under investigation by the Bank Board. The Third Circuit held not that the Board lacked authority under the Act to assert such a violation of law, but, rather, that the Bank Board's position was incorrect on the merits. 277 F. 2d at 441. Thus no conflict exists which calls for resolution by this Court.

3. Finally, the court below correctly held that the Administrative Procedure Act does not preclude the Bank Board from asserting claims based, as this one is, on the common law. This is not an instance of an administrative agency attempting to proscribe, by means of its unpublished regulations, acts which

might otherwise be entirely lawful; nor is it a situation in which parties are subjected to penalties for failing to comply with procedural requirements of which they were unadvised. In the circumstances, sections 3 and 4 of the Administrative Procedure Act, 5 U.S.C. 1002 and 1003, are not apposite. Compare *Kessler* v. *F.C.C.*, 326 F. 2d 673, 690 (C.A.D.C.) and *United States* v. *Aarons*, 310 F. 2d 341, 346 (C.A. 2), with *Gonzalez* v. *Freeman*, 334 F. 2d 570 (C.A. D.C.) and *Hotch* v. *United States*, 212 F. 2d 280, 283 (C.A. 9). See, also, 1 Davis, *Administrative Law Treatise*, § 6.10 (1958 Ed.).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

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